

A LEO FASTERNERS SDN BHD

v.

WILAYAH LEASING SDN BHD

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA

MOHD GHAZALI YUSOFF JCA

AZMEL MAAMOR JCA

[CIVIL APPEAL NO: B-02-849-2000]

C 5 DECEMBER 2005

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Whether appellate court ought to interfere with findings of trial judge - Whether there was an appealable error*

D The present case concerned the execution of seven machinery-related hire-purchase agreements by the appellant in the respondent's favour. The issue was whether it was the appellant or the respondent who was the legal and beneficial owner of the machinery. The High Court found for the respondent on that issue and granted a declaratory decree to that effect. The
E appellant contended that the High Court had erred and appealed, submitting that the whole transaction was a sham or device to cloak an illegal moneylending contract.

F **Held (dismissing the appeal)**
Per Gopal Sri Ram JCA:

[1] In the instant case, there was no credible denial of the respondent's version. The judge was, therefore, perfectly
G entitled to act on it and having done so, it would be wrong for this court to interfere with his findings, particularly so in this case, where there had been no misdirection on the facts and no misreading of the documents. The judge had looked at all the evidence and had come to the conclusion that this
H was a case of a genuine hire-purchase transaction. There was no appealable error in his judgment. (p 124 B & G)

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[Bahasa Malaysia Translation Of Headnotes]

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Kes semasa adalah berhubung pelaksanaan tujuh perjanjian sewa beli yang berkaitan dengan mesen-mesen oleh perayu bagi manfaat responden. Isunya adalah sama ada ianya perayu atau responden yang menjadi pemilik undang-undang dan benefisial mesen-mesen tersebut. Mahkamah Tinggi memutuskan isu dengan berpihak kepada responden, sekaligus mengeluarkan satu dekri mengenainya. Perayu mengatakan bahawa Mahkamah Tinggi khilaf, dan dalam rayuannya berhujah bahawa keseluruhan transaksi adalah suatu olok-olok atau muslihat untuk menutupi suatu kontrak peminjaman wang yang tidak sah.

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Diputuskan (menolak rayuan)**Oleh Gopal Sri Ram HMR:**

[1] Dalam kes semasa, tidak terdapat penyangkalan kukuh terhadap versi responden. Dengan itu, tiada salahnya bagi hakim bertindak atas versi tersebut dan, dengan beliau berbuat demikian, adalah salah bagi mahkamah ini untuk mengganggu dapatan-dapatan beliau, sementelah dalam kes ini tidak terdapat sebarang salah arahan fakta atau salah tafsir dokumen-dokumen. Hakim telah meneliti semua keterangan dan telah mencapai rumusan bahawa ini adalah suatu kes yang melibatkan transaksi sewa beli yang tulen. Maka itu, tiada sebarang kekhilafan pada keputusan beliau yang boleh dirayui.]

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Case(s) referred to:

Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd [2001] 4 CLJ 261 CA
(*refd*)

Polsky v. S and A Services [1951] 1 All ER 185 (*fol*)

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 MLJ 433 (*fol*)

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For the appellant - Prasad Abraham (Zakaria Ariffin with him); M/s Aziz Zakaria Shaiful & Wan

For the respondent - L Sabapathy (CW Lee & S Bhuvaneswary with him); M/s Gooi & Azura

[*Appeal from High Court, Shah Alam; Originating Summons No: MT4-24-302-2000*]

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Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

This is a very simple case. It is purely factual. The appellant executed 7 hire purchase agreements in the respondent's favour.

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All of them relate to machinery. The issue is whether it is the appellant or the respondent who is the legal and beneficial owner of the machinery. The High Court found for the respondent on that issue and granted a declaratory decree to that effect. The appellant says that the High Court erred and that it ought to have held the appellant to be the legal and beneficial owner of the machinery in question.

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All the documents show that it was the respondent who purchased the machinery from the vendor and let it under hire purchase agreements to the appellant. The appellant says that despite what appears on the face of the documents, the whole transaction is a sham or device to cloak an illegal moneylending contract. Now, I must mention one matter for completeness. The appellant is under receivership. Receivers and managers were appointed under a debenture. So, the real appellants are the receivers and managers.

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In his judgment the learned judge undertook a careful examination of the affidavit and documentary evidence presented to him. He accepted the evidence of Kwek Chui Puan, the former finance director of the appellant who has personal knowledge of the transaction and who was directly involved in negotiating the hire purchase agreements in question. He also found as a fact that the appellant did not make any payments towards the purchase price of the machinery. As against the primary, first hand evidence produced by the respondent, the appellant sought to make out its case based on conjecture and suspicion. But as has been said on numerous occasions, conjecture and suspicion is no substitute for proof. See, *Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd* [2001] 4 CLJ 261.

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No doubt, this is a case which the judge decided on affidavit evidence. Neither side asked to cross examine its opponent's witnesses. In a case such as this the approach to be adopted by the primary trier of fact is that set out in the Advice of Board of the Privy Council delivered by Lord Templeman in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433:

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In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender ... At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations.

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In the instant case, there was no credible denial of the respondent's version. The judge was therefore perfectly entitled to act on it. Having done so, it would, in my judgment, be wrong of us to interfere with his findings. Particularly so in this case where there has been no misdirection on the facts and no misreading of the documents.

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Before concluding let me say this. It is one thing to allege that a transaction is a sham. It is quite another to bring home that allegation to the satisfaction of the court. Here the appellant had to establish that the hire purchase agreements – all 7 of them – were part of a moneylending transaction that it is to say, that they told a lie about themselves. As Lord Goddard said in *Polsky v. S and A Services* [1951] 1 All ER 185:

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The Court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods. It is perfectly clear from the judgments of Lord Esher MR, in *Re Watson* [1890] 25 QBD 27; 63 LT 209 and in *Madell v. Thomas & Co* [1891] 1 QB 230; 64 LT 9 that that is the question which has to be determined. The Court is not to look merely at the documents. It must discover what the real transaction was.

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This is precisely what the judge did. He looked at all the evidence and came to the conclusion that this was a case of a genuine hire purchase transaction. I can find no appealable error in his judgment.

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A In the event, the appeal was dismissed without calling upon counsel for the respondent. The usual orders consequent upon a dismissal were made.

B My learned brothers Mohd Ghazali bin Mohd Yusoff and Azmel bin Haji Maamor, JJCA have seen this judgment in draft and have expressed their agreement with it.

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